LIM KUOH WEE

v.

RIMBA MUDA TIMBER TRADING

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOKHTAR SIDIN JCA
RAUS SHARIF J
[CIVIL APPEAL NO: C-02-246-1999]
20 SEPTEMBER 2004

TORT: *Conversion - Chattels - Action against defendant for selling off plaintiff's timber - Whether mistake or inadvertence on defendant's part is a defence - Whether plaintiff can maintain action in conversion - Whether plaintiff has good title to timber - Whether contracts giving plaintiff ownership of timber illegal - Whether property in chattels can pass under illegal contracts - Tort of trespass, whether established*

One Mohamad Aminallah Mat Long ('the licensee') had held a licence to fell and extract timber from a 50.5 acre forest concession in the State of Pahang. To harvest the timber, he engaged the defendant who, in turn, sub-contracted out the work to the plaintiff. The terms of the original agreement between the defendant and the licensee allowed the defendant to sell the felled timber. That notwithstanding, the sub-contract as between the plaintiff and the defendant also contained a clause entitling the plaintiff to sell the timber (thereby effectively passing the property in the felled timber to the plaintiff). Subsequently, the licensee entered into another agreement with the defendant permitting the latter to harvest timber from the concession. The defendant then entered into possession of the forest concession and dealt with the logs therein. Aggrieved, the plaintiff brought an action in the torts of trespass and conversion against the defendant. The trial judge dismissed the action (holding that the defendant had acted under an *innocent* mistake in selling off the logs) and the plaintiff appealed to the Court of Appeal.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1a] Not every intentional touching of another's goods is an actionable trespass. A mental element is necessary to attract liability in the tort of trespass to goods. Hence, the trial judge was correct in holding that the defendant was not liable to the plaintiff in the tort of trespass. (p 621 b-e)

[1b] Nevertheless, the trial judge was wrong in absolving the defendant of liability in the tort of conversion. This was because mistake or inadvertence is **no** defence to an action in conversion. Dealing with the goods of one person under the honest (and even reasonable) mistake that they belong to someone else is a conversion. Hence, the act of the defendant in removing and selling off the timber constituted an act of conversion. (pp 621 e-h & 622 a)

[1c] Even assuming that the defendant's contention was correct, that is to say that the original agreement between the defendant and the licensee as well as the sub-contract between the plaintiff and the defendant were both tainted with illegality, yet the plaintiff must succeed on the tort of conversion. This was because property in chattels can pass under an illegal and unenforceable contract. Indeed, the plaintiff had acquired legal title to the logs under the (supposedly) illegal contracts, and as long as the title was vested in him he could bring the action in conversion against the defendant. (pp 622 d-h & 623 a-d)

[Judgment for plaintiff; damages ordered.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Seorang Mohamad Aminullah Mat Long ('penerima lesen') memegang suatu lesen untuk menebang dan mengeluarkan kayu balak dari konsesi hutan seluas 50.5 ekar di Negeri Pahang. Beliau telah melantik defendan untuk mengeluarkan kayu kayan berkenaan, manakala defendan pula, selepas itu, melantik plaintif untuk melakukan kerja-kerja tersebut. Terma asal perjanjian antara defendan dan penerima lesen membenarkan defendan untuk menjual hasil kayu kayan yang dikeluarkan. Apapun, sub-kontrak di antara plaintif dan defendan juga mengandungi fasal yang membenarkan

plaintif untuk menjual kayu kayan (sekaligus menyerahkan harta dalam kayu kayan yang ditebang kepada plaintif). Penerima lesen kemudian memeterai satu lagi perjanjian dengan defendan membenarkan defendan mengeluarkan kayu kayan dari konsesi. Berikutnya, defendan memasuki kawasan konsesi dan memulakan kerja-kerja pengeluaran kayu kayan di situ. Terkilan, plaintif mengambil tindakan tort pencerobohan dan penukaran terhadap defendan. Hakim bicara menolak tuntutan (dengan memutuskan bahawa defendan bertindak di bawah kesilapan fakta apabila menjual kayu kayan) dan plaintif merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah

[1a] Bukan semua perbuatan menyentuh harta orang lain menjadikannya pencerobohan yang boleh didakwa. Unsur mental adalah perlu bagi membangkitkan liabiliti dalam tort pencerobohan terhadap barangan. Oleh yang demikian, hakim bicara betul bilamana mendapati bahawa defendan tidak bertanggungan kepada plaintif dalam tort pencerobohan.

[1b] Walaupun begitu, hakim bicara silap apabila melepaskan defendan dari liabiliti tort penukaran. Ini kerana kesilapan atau kecuaian bukanlah suatu pembelaan kepada tindakan penukaran. Mengendali barangan seseorang di bawah kesilapan ikhlas (malah kesilapan munasabah sekalipun) bahawa ia adalah milik seseorang lain adalah penukaran. Oleh itu, tindakan defendan mengeluar dan menjual kayu kayan adalah satu perbuatan tort penukaran.

[1c] Jikapun defendan diandaikan betul dalam hujahnya, yakni bahawa perjanjian asal di antara defendan dan penerima lesen serta perjanjian di antara plaintif dan defendan adalah kedua-duanya dicemari ketidaksahan, plaintif masih harus berjaya di dalam tort penukaran. Ini kerana harta dalam barangan masih boleh diserahkan walaupun di bawah kontrak yang tidak boleh dilaksanakan atau tidak sah. Malah, plaintif telah memperoleh milikan sah di bawah kontrak (yang kelihatan) tidak sah tersebut, dan selagi milikan terletakhak padanya beliau boleh membawa tindakan penukaran terhadap defendan.

Penghakiman kepada plaintif; gantirugi diperintahkan.]

Case(s) referred to:
Hollins v. Fowler [1875] LR 7 HL 757 ***(refd)***
Nasib Singh v. Ramasamy [1969] 1 MLJ 211 ***(refd)***
Singh v. Ali [1960] MLJ 52 ***(refd)***
Tinsley v. Miligan [1994] 1 AC 340 ***(refd)***

Other source(s) referred to:
Clerk & Lindsell on Torts, 18th edn, p 788, para 14-135; p 153 para 3-122

For the appellant - Bastian P Vendargon; M/s Vendargon & Partners
For the respondent - Karam Singh Bhal (M Mogan); M/s Ikmal Hisham Idris Bhal & Co

[Appeal from High Court, Temerluh; Suit No: 22-13-1996]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:
The point of law raised in this appeal was decided by us only quite recently in another case. It has to do with the rights of a party to an illegal transaction. There is another point as well. But first the facts.

One Mohamad Aminallah bin Mat Long (Aminallah) was the holder of a licence to fell and extract timber from a 50.5 acre forest concession in the State of Pahang. By an agreement dated 6 May 1994, he engaged Chan Kwak Meng ("Chan") as his contractor to harvest the timber. Chan in turn sub-contracted the extraction of the timber to the plaintiff (the appellant before us) by way of an agreement dated 28 January 1995. The agreement that Chan had with Aminallah contained a clause that entitled the former to sell the felled timber. A similar clause in the agreement that the plaintiff had with Chan entitled the plaintiff to extract and sell the felled timber. I mention this because the clause in question had the effect of passing the property in the felled timber to the plaintiff, a point of considerable importance in this case as will transpire later in this judgment. Let me continue with the facts. Later, Aminallah entered into another agreement with the defendant permitting him also to harvest timber from the concession. It is the plaintiff's case – indeed it is common ground – that the defendant, having entered into possession of the area of the concession, interfered with the logs that belonged to the plaintiff. The plaintiff accordingly brought an action in the torts of trespass and conversion against the defendant. The learned judge who tried the action dismissed it. The plaintiff now appeals to us.

The principal ground on which the trial judge held against the plaintiff was that the defendant had acted in ignorance of the plaintiff's ownership of the logs in question. In short, the judge appears to have accepted that the defendant had acted under a mistake when it sold off the plaintiff's logs.

Now, there is respectable authority to suggest that not every intentional touching of another's goods is an actionable trespass. Some mental element is necessary to attract liability in the tort of trespass to goods. The editors of the 18th edition of *Clerk & Lindsell on Torts* at p. 788, para 14-135 express the following opinion which in my view is good law:

> This does not mean, however, that all intentional touching of another's goods should amount to trespass. On the contrary, the theatregoer who moves someone else's coat in the cloakroom in order to retrieve his own should not be liable in trespass, nor should the pedestrian who brushes past a car parked in a crowded street, perhaps breaking off an ornamental mascot in the process. It is submitted that an analogy should be drawn here with trespass to the person, where Goff LJ has said that there is not trespass where the actor has not in the circumstances 'gone beyond generally acceptable standards of conduct'. (The editors here refer in a footnote to *Collins v. Wilcock* [1984] 1 WLR 1172). The theatregoer and the pedestrian have not; and that is the ground on which they ought to be excused.

Accordingly, I am prepared, without more, to accept the learned judge's finding that the defendant is not liable to the plaintiff in the tort of trespass. However, the learned judge in my view fell into error when absolving the defendant of liability in the tort of conversion. For, it is settled law that mistake or inadvertence is no defence to an action in conversion. Once again I quote from *Clerk & Lindsell,* 18th edition at p. 153, para 3-122:

> Mistake may lead the defendant into liability which he did not, and sometimes could not, reasonably anticipate. However, mistake of law will not excuse, nor, speaking generally, will mistake of fact. So, to deal with the goods of one person under the honest and even reasonable mistake that they belong to someone else is a conversion.

The editors of *Clerk & Lindsell* cite Hollins v. Fowler [1875] LR 7 HL 757 as authority for the last proposition. In that case, Blackburn J said:

> However hard it may be on those who deal innocently and in the ordinary course of business with a person in possession of goods, yet, as long as the law as laid down in *Hardman v. Booth*, 1 H. & C. 803, is unimpeached, I think it is clear law, that if there has been what amounts in law to a conversion of the plaintiff's goods, by any one, however innocent, that person must pay the value of the goods to the real owners, the plaintiffs.

The act of the defendant in removing and selling the timber constitutes an act of conversion. Of that there can be no doubt. The plaintiff ought therefore to succeed unless there is any other bar to recovery of damages for conversion. The defendant has argued that there is such a bar.

Before us, counsel for the defendant for the first time took the point that the contract between the Chan and Aminallah was illegal as was that between Chan and the plaintiff. Since these contracts were tainted with illegality, the plaintiff acquired no title to the logs in question and therefore could not maintain an action for conversion. The defendant was permitted to take the point although it was neither raised nor argued in the court below on the authority of *Nasib Singh v. Ramasamy* [1969] 1 MLJ 211. As counsel for the plaintiff was caught by surprise, the appeal was adjourned to enable him to answer the point. At the adjourned hearing, counsel for the plaintiff purported to rely on the *jus tertii* argument to answer the defendant's eleventh hour attempt to defeat the claim. With respect, the *jus tertii* argument does not have much relevance to the present case as there is another and more convenient avenue of solution.

For present purposes, let it be assumed, without deciding, that the contracts in question are tainted with illegality. Yet the defendant must fail because it is axiomatic that property in a chattel may pass under an illegal contract. Thus, in *Tinsley v. Milligan* [1994] 1 AC 340, Lord Browne-Wilkinson, after reviewing the leading authorities on the subject distilled three propositions from them:

> From these authorities the following propositions emerge: (1) property in chattels and land can pass under a contract which is illegal and therefore would have been unenforceable as a contract; (2) a plaintiff can at law enforce property rights so acquired provided that he does not need to rely on the illegal contract for any purpose other than providing the basis of his claim to a property right; (3) it is irrelevant that the illegality of the underlying agreement was either pleaded or emerged in evidence: if the plaintiff has acquired legal title under the illegal contract that is enough.

So here, the plaintiff did acquire legal title to the logs under what is to be assumed is an illegal agreement. And for so long as that title is vested in him, he may bring an action in respect of them so long as he does not have to rely on the illegal transaction. That is what has happened here. In *Singh v. Ali* [1960] MLJ 52, the plaintiff was able to recover his lorry (the subject matter of an illegal contract) in the tort of detinue despite the illegality. Lord Denning said:

It was an action for a declaration coupled with a claim in detinue. In order to get a declaration, it was essential for the plaintiff to show that he was the owner of the lorry and that it was an authorised vehicle. In order to succeed in detinue, it was essential for the plaintiff to show that he had the right to immediate possession of the lorry at the time of commencing the action, arising out of an absolute or special property in it, see *Bullen & Leake*, 3rd Edn. p. 312. And in detinue their Lordships think he succeeded. Although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out: and on that account it was effective to pass the property in the lorry to the plaintiff. There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose – and one of them transfers property to the other in pursuance of the conspiracy – then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin, see *Scarfe v. Morgan* [1838] 4 M & W at p 281, per Parke B.

If the plaintiff in *Singh v. Ali* could recover his lorry in detinue, it is difficult to see why the instant plaintiff should not be able to recover damages against the instant defendant for conversion of his logs. He does not rely on any illegal transaction.

His claim is based on his legal ownership of the logs and there is no reason for him not to succeed.

I would accordingly allow this appeal, set aside the orders of the learned judge, enter judgment for the plaintiff for damages for conversion and remit the matter to the senior assistant registrar of the High Court to assess damages. The defendant must pay the plaintiff's costs here and in the court below. The deposit is refunded to the plaintiff.

My learned brothers Mokhtar bin Haji Sidin, JCA and Md Raus bin Shariff, J have seen this judgment in draft and have expressed their agreement with it.